IN THE SUPREME COURT OF THE STATE OF NEVADA

THERESSA "ZISSA" JANETTA RAMANI, individually and as the natural mother and guardian of MARIO SAMUEL RAHMANI, a minor,

Appellant,

vs.

SHOSHANA SEGELSTEIN, an individual; CHABAD OF SOUTHERN NEVADA, INC., a Nevada nonprofit corporation; YEHOSHUA HARLIG a/k/a SHEA HARLIG, and DINA HARLIG a/k/a DEBORAH HARLIG, husband and wife; CHABAD OF SUMMERLIN, INC., a Nevada nonprofit corporation; and YISROEL SCHANOWITZ, an individual,

Respondents.

Case No. 49341

APPEAL

from the Eighth Judicial District Court
The Honorable TIMOTHY C. WILLIAMS, District Judge
District Court Case No. A466121

BRIEF AMICUS CURIAE OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS

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BRIEF AMICUS CURIAE OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS

The Church of Jesus Christ of Latter-day Saints ("LDS Church" or "Church") is an unincorporated religious association headquartered in Salt Lake City, Utah.[1] Church membership exceeds 13 million people, with more than 27,000 congregations throughout the world. Our most basic beliefs include the principles of religious freedom and toleration: "We claim the privilege of worshiping Almighty God according to the dictates of our own conscience, and allow all men the same privilege, let them worship how, where or what they may." Article of Faith, No. 11.

The LDS Church is deeply concerned that the law in Nevada accommodate and respect the autonomy and freedom that the First Amendment enshrines for all faith

[1]In addition to terms like "religious associations" and "religious organizations," the term "churches" will also be used inclusively in this brief to denote religious institutions and communities—be they, strictly speaking, churches, synagogues, mosques, ashrams, or ministries of any type. Similarly, terms like "clergyman" and "minister" are used to denote any person within a religious community whose ecclesiastical position is "important to the spiritual and pastoral mission of the church." *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 461 (D.C.Cir. 1996).

communities. Even as it unequivocally condemns abuse and exploitation of any kind, the LDS Church must nevertheless caution against broad-brush approaches to liability—such as those advocated by Appellant here—that fail to account for vital constitutional rights. Subjecting religious organizations to broad tort rules that were created for unrelated secular contexts will directly burden the exercise of religion, excessively entangle civil courts in religious affairs, and inevitably preference one faith group over another.

Each of the questions this Court has ordered to be addressed implicates highly sensitive issues of religious freedom. The answers this Court provides will have serious implications for the autonomy of the LDS Church and the religious exercise of thousands of its members in Nevada. The LDS Church has the highest interest in seeing those issues fully briefed and properly resolved.

INTRODUCTION

Churches and the clergy members who serve them are not ordinary businesses or professionals. The state properly regulates the structure and activities of secular businesses and their agents through common law claims that compel conformity to social norms. But churches and clergy are different. While not immune from tort liability, they cannot be subjected to all of the same tort claims available against secular businesses and their agents. The First Amendment guarantees faith communities the autonomy to define and govern themselves in ecclesiastical matters free from the state's supervision or undue interference. It thus bars certain tort claims that would entangle civil courts or juries in matters of church doctrine, polity, ecclesiastical duty, or the conformity of members or clergy to religious standards. To paraphrase the co-author of Prosser's preeminent hornbook on torts, the First Amendment requires that courts use "Surgical Instruments, Not Machetes," when remedying civil wrongs allegedly committed by clergy or churches. *See* VICTOR E. SCHWARTZ & LEAH LORBER, *Defining the Duty of Religious Institutions to Protect*

Others: Surgical Instruments, Not Machetes, Are Required, 74 U. Cin. L. Rev. 11 (2005).

Such precision is now required of this Court as it establishes Nevada's law in the five constitutionally sensitive areas indentified in its November 3, 2008 Order of Limited Remand ("Order"). As we demonstrate below, several of the causes of action referenced in the Order and advanced by Appellant Theressa "Zissa" Janetta Ramani ("Ramani") are barred by the First Amendment or by established common law principles. Claims attacking a church's decision to investigate a member's religious status within the faith (issue #1) or that seek to impose secular fiduciary duties on purely religious relationships (issue #2) or challenge a church's selection or retention of its clergy (issue #5) violate the First Amendment by excessively entangling civil courts and juries in ecclesiastical matters. As to vicarious liability (issues #3 & #4), nearly all courts hold that churches are not vicariously liable for the sexual misconduct of clergy or volunteers because such conduct lies far outside the course and scope of any agency relationship. This Court should reject such claims.

By contrast, this Court could craft a constitutionally appropriate claim against a church for failing to supervise a clergy member (issue #5) by expressly limiting the claim to cases where the church disregarded actual notice of the danger. *See Gibson v. Brewer*, 952 S.W.2d 239 (Mo. 1997). Through such a claim—and others like battery and intentional infliction of emotional distress that generally do not implicate First Amendment concerns—this Court can satisfy the need for a remedy in egregious cases of clergy misconduct without infringing on the First Amendment rights of religious organizations.

ARGUMENT

The issues before the Court must be considered and resolved in light of fundamental First Amendment principles. One such principle is that the state cannot entangle itself in religious affairs. *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). A closely related one is that government cannot become involved in the

interpretation of religious doctrine, practices, and beliefs. Since *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871), the United States Supreme Court has repeatedly held that "'civil courts exercise no jurisdiction'" over "'a matter which concerns theological controversy.'" *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713-14 (1976) (quoting *Watson*, 80 U.S. at 733-34). Civil courts cannot "engage in the forbidden process of interpreting and weighing church doctrine." *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 451 (1969). Indeed, such a process "can play *no* role in any ... judicial proceedings" because it unconstitutionally "inject[s] the civil courts into substantive ecclesiastical matters." *Id.* at 450-51 (emphasis in original). Hence, the First Amendment bars courts from undertaking "an analysis or examination of ecclesiastical polity or doctrine in settling [civil] disputes." *Jones v. Wolf*, 443 U.S. 595, 605 (1979).

The High Court has also held that churches must have the "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952); *see Bell v. Presbyterian Church*, 126 F.3d 328, 331 (4th Cir. 1997) (quoting *Kedroff*). This rule of judicial noninterference "applies with equal force to church disputes over church polity and church administration." *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 710 (1976). Civil courts cannot adjudicate "'a matter which concerns ... church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them.'" *Id.* at 713-14.

These constitutional first principles limit the kinds of claims that can be brought against clergy and religious organizations. Tort claims that require civil courts to entangle themselves in the examination of religious doctrines, beliefs, or polity, or that interfere in church governance, are unconstitutional. An example directly relevant to this case is the claim of clergy malpractice, which courts have universally rejected. *See Franco v. Church of Jesus Christ of Latter-day Saints*, 21 P.3d 198, 204 (Utah 2001) ("courts throughout the United States have uniformly

rejected claims for clergy malpractice under the First Amendment"). That claim cannot be adjudicated because it unconstitutionally "require[s] courts to establish a standard of reasonable care for religious practitioners practicing their respective faiths, which necessarily involves the interpretation of [religious] doctrine." *Amato v. Greenquist*, 679 N.E.2d 446, 450 (Ill. Ct. App. 1997); *see H.R.B. v. J.L.G.*, 913 S.W.2d 92, 98 (Mo. App. 1995) (adjudication of clergy malpractice claims "would require courts to define and express the standard of care followed by a reasonable clergy of the particular faith involved, which in turn would require the Court" to examine and interpret religious doctrines, beliefs and practices).

As explained below, these constitutional principles bar or limit many of the claims referenced in the Court's Order. They do not, however, preclude meaningful relief in cases of serious clergy misconduct.

I.

THE FIRST AMENDMENT CATEGORICALLY BARS CIVIL CLAIMS CHALLENGING A CHURCH'S OR CLERGYMAN'S DETERMINATION OF A PERSON'S MEMBERSHIP STATUS WITHIN THE FAITH

The first issue in the Order is whether it would violate the "First Amendment's excessive entanglement doctrine" for a civil court to adjudicate Ramani's "claim that [Chabad of Summerlin, Inc., Rabbi Schanowitz, and Rabbi Harlig] negligently and intentionally inquired into whether [she] was Jewish." Order at 2-3. It unquestionably does. Whether Ramani is Jewish—and, more broadly, when it is appropriate for a religious organization to inquire into a person's eligibility to be a member of the faith—are quintessentially religious questions. Tellingly, the inquiry into Ramani's Jewishness was ultimately heard and decided by an esteemed rabbinical court. Compl. ¶¶ 51, 53. Ramani's claim requires a court to second-guess that purely ecclesiastical determination.

This is precisely the sort of religious dispute that the First Amendment precludes civil courts from adjudicating. To permit such a claim would directly entangle the court in the interpretation of religious doctrine and displace the formal

and informal ecclesiastical structures within a religious organization for resolving such issues. Questions of membership in a particular faith are inherently religious. This Court should expressly acknowledge that churches have a First Amendment right to determine the eligibility of their members for purely ecclesiastical benefits, such as receiving sacraments and enjoying continuing membership, without fear of civil liability—even if such determinations cause embarrassment or loss of social status. *See Paul v. Watchtower Bible and Tract Soc'y*, 819 F.2d 875, 883-84 (9th Cir. 1987) (First Amendment precludes a former Jehovah's Witness from recovering damages for injuries arising from the church practice of shunning former members); *Guinn v. Church of Christ*, 775 P.3d 766, 775 (Okl. 1989) (First Amendment bars claims against church leaders for acts undertaken to discipline a member of the congregation); *see also Lewis v. Holy Spirit Ass'n for Unification of World Christianity*, 589 F. Supp. 10, 12 (D. Mass. 1983) ("conditions of membership in a religious organization are generally not subject to judicial review").

Indeed, claims of this sort are nothing more than the uniformly rejected claim of clergy malpractice. *See Franco,* 21 P.3d at 204. The core of the claim is the non-justiciable assertion that the ecclesiastical defendant failed to exercise its religious authority in accordance with proper religious standards or motives. *See* Br. App. 12-13 (asserting that "Ms. Ramani was entitled to have a jury or the court hear evidence of how such [an] inquiry [into her Jewishness] was made" by the religious respondents). Such claims impermissibly require the court (or jury) to interpret religious doctrine. That advocates can label the claims "a secular dispute" (Br. App. 11) changes nothing.[2] *See Franco*, 21 P.3d at 204 (labels irrelevant). They are claims for clergy malpractice and thus barred.[3]

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[2]Adjudicating Ramani's legal challenge to the ecclesiastical determination of her religious membership status would inevitably entangle this Court in ecclesiastical matters contrary to the First Amendment and, moreover, would emphatically not be among the kinds of "secular disputes involving religious institutions" that "can be

(continued)

II.

THE FIRST AMENDMENT PRECLUDES THE IMPOSITION OF A FIDUCIARY DUTY BASED ON RELIGIOUS DOCTRINE OR ECCLESIASTICAL DUTIES

Transcending the facts of this case, the second issue asks whether this Court "should recognize a breach of fiduciary duty claim, arising from a clergy member's alleged inappropriate sexual conduct with a congregant?" Order at 3. For several reasons, it should not.

A. Imposing a Secular Fiduciary Relationship Based on Religious Facts Violates the First Amendment

First Amendment entanglement problems bedevil any effort to cast clerics and congregants in a fiduciary relationship, because it compels the court to review and weigh the religious doctrines and practices that form and shape the alleged relationship. As the court in *H.R.B. v. J.L.G.* explained, a breach of fiduciary duty claim "inevitably require[s] inquiry into the religious aspects of the [clergyman-parishioner] relationship" in order to establish "the duty owed by [a clergyman] to [his or her] parishioners"). 913 S.W.2d at 99. The nature of relationships between clerics and congregants varies greatly depending on religious doctrines and teachings: different faiths understand clergy in radically different ways, from consecrated intermediary with God to fellow believer. Hence, "it is impossible to show the existence of a fiduciary relationship [in clergyman-parishioner cases] without resort to

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decided on neutral legal principles." *Vione v. Tewell*, 820 N.Y.S.2d 682, 685 (N.Y. Sup. Ct. 2006).

[3] *See Nally v. Grace Community Church of the Valley*, 763 P.2d 948, 960 (Cal. 1988) (rejecting a claim of clergy malpractice because imposing a duty of care on pastoral counselors "would necessarily be intertwined with the religious philosophy of the particular denomination or ecclesiastical teachings of the religious entity"); *Baumgartner v. First Church of Christ Scientist*, 490 N.E.2d 1319, 1324 (Ill. App.), *cert. denied,* 479 U.S. 915 (1986) (holding that "adjudication of the present case would require the court to extensively investigate and evaluate religious tenets and doctrines" and that "the first amendment precludes such an intrusive inquiry by the civil courts into religious matters").

religious facts." *Langford v. Roman Catholic Diocese of Brooklyn*, 677 N.Y.S.2d 436, 439 (N.Y. 1998) (rejecting fiduciary duty claim).

This case illustrates the problem. Adjudicating Ramani's breach of fiduciary duty claims would unavoidably entangle the court in religious inquiries. As her own allegations make clear, "[r]eligion was not merely incidental to [Ramani's] relationship with [Rabbi Harlig and Rabbi Schanowitz]; *it was the foundation for it.*" *H.R.B.*, 913 S.W.2d at 99 (emphasis added); *see* Br. App. 17. Deciding whether the respondents owed Ramani fiduciary duties covering the range of wrongs she alleges would require the Court to examine the nature of an ecclesiastical relationship. This in turn would require judicial examination of the religious beliefs, doctrines, and ecclesiastical canons constituting that relationship—in sharp defiance of the First Amendment. *See Jones*, 443 U.S. at 605 (Constitution prohibits courts from undertaking "an analysis or examination of ecclesiastical polity or doctrine in settling [civil] disputes").

B. Imposing a Legal Standard of Care that Clerics Owe to Congregants Violates the First Amendment

Because a fiduciary is "one who owes a duty to another by virtue of the fiduciary relationship," *Stalk v. Mushkin*, 199 P.3d 838, 843 (Nev. 2009), a claim against a church or cleric for breach of fiduciary duty will require the Court to decide what duties are owed a parishioner. This too violates the First Amendment.

Imposing fiduciary duties based on *church-defined* ecclesiastical standards is simply a prohibited claim for clergy malpractice by another name. *See Dausch v. Rykse*, 52 F.3d 1425, 1428-29 (7th Cir. 1994) (per curiam) (affirming the district court's rejection of a fiduciary duty claim as "an elliptical way to state a clergy malpractice claim"); *Schieffer v. Catholic Archdiocese of Omaha*, 508 N.W.2d 907, 912 (Neb. 1993). Using tort law to enforce religious leaders' compliance with their own churches' ecclesiastical standards would unconstitutionally displace churches as custodians of their own affairs, violating the right of churches "to decide for

themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff*, 344 U.S. at 116.

Imposing a *state-defined* standard of care on clergy members for their acts and omissions *as clergy* infringes on the First Amendment rights of clergy and churches no less profoundly. Dictating how clergy members must relate to their congregants would unconstitutionally impose a secular orthodoxy on churches. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (Constitution denies government authority "to prescribe what shall be orthodox in ... religion"). Clergy do not owe fiduciary duties to congregants merely by virtue of being clergy; their religious duties do not give rise to legal ones, and the State simply has no authority to decree ecclesiastical duties and then punish clergy who fail to live up to them. *See Petrell v. Shaw*, 902 N.E.2d 401, 407 (Mass. 2009) (rejecting a claim of fiduciary duty, in part, because the relationship between the claimant and the church authorities "was based on no more than their shared religious affiliation" that "provides no basis to support liability in a civil context").

Forcing a single secular standard of care on clergy (or churches) to govern their relations with congregants risks the irreparable erosion of the constitutionally protected autonomy of churches and, in time, the transfer of control over ecclesiastical affairs to the state. *McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972) (reasoning that "if a state can second-guess religious policy, procedure, or action by requiring a church to meet secular standards of 'care, the state will effectively control the religious organization and its operations by threat of tort litigation and liability.").

Moreover, the very notion of a fiduciary relationship giving rise to secular duties of care ignores the complex realities of the relationship between a cleric or church and a member of the faith. A rabbi, priest, or bishop owes duties to a congregant by virtue of *religious* doctrines, vows, commitments, and understandings, not "by virtue of the fiduciary relationship." *Stalk*, 199 P.3d at 843. Casting that

relationship as a legal one imposes an ill-fitting secular framework on a religious relationship. To take just one problem, a basic legal obligation of a fiduciary is to be loyal. *See* RESTATEMENT (SECOND) OF TRUSTS § 170 (1959). Indeed, Nevada law imposes on at least some fiduciaries the duty of "undivided loyalty." *Leavitt v. Leisure Sports Inc.*, 103 Nev. 81, 92, 734 P.2d 1221, 1228 (1987) (discussing the duties owed by officers and directors to a corporation). Yet the loyalty of a cleric is often divided—and legitimately so. A religious leader bears duties to his or her church and flock as a whole, within terms prescribed and understood by religious doctrine and personal commitment or vow. Making a cleric legally responsible to act in the best interest of a single congregant—or to comply with other aspects of a fiduciary duty—would unconstitutionally force the cleric to abandon his or her most sacred obligations to avoid civil liability.

C. A Person Who Is Both a Clergy Member and a Secular Professional Can Be Held Liable for Breach of Fiduciary Duties Arising Out of His Role as a Professional But *Not* for Duties Allegedly Arising Out of His Role as a Clergy Member

A person can be a member of the clergy within his or her church while still having a full and unrelated career as a secular professional. In the LDS Church, clergy (bishops and stake presidents) are unpaid and have full-time jobs in their chosen secular vocations. LDS clergy are often doctors, dentists, lawyers, accountants, and so forth in their professional lives. Some work and hold professional credentials in areas such as psychology and social work.

A person who has both the status of clergy within a church and also the status of a secular professional will often not be acting as a religious leader. In determining whether a fiduciary duty exists, therefore, it is critical for courts to first determine which "hat" the person was wearing—clerical or professional—when the alleged tort was committed. Courts have recognized the propriety of imposing a fiduciary duty when such a person engages in sexual misconduct while acting in a professional

secular capacity rather than in a religious capacity.[4] Some courts have also allowed secular claims for breach of fiduciary duty against a person who is a clergy member when the religious elements of the relationship have been essentially vitiated due to sexual exploitation. *See H.R.B.*, 913 S.W.2d at 98. But the key is that religious counseling and the clergy-parishioner relationship do not create a fiduciary duty. For such a duty to exist, the person must be acting in a secular professional capacity. No claim for breach of fiduciary duty can arise out of religious facts.

The leading case on this point is *Nally v. Grace Community Church of the Valley*. There the California Supreme Court rejected a claim of negligence against a clergyman for allegedly failing to warn parents of the mental state of their son who committed suicide after receiving religious counseling. The court explained that "[b]ecause of the differing theological views espoused by the myriad of religions in our state and practiced by church members, it would certainly be impractical, and quite possibly unconstitutional, to impose a duty of care on pastoral counselors. *Such a duty would necessarily be intertwined with the religious philosophy of the particular denomination or ecclesiastical teachings of the religious entity.* 763 P.2d at 960 (emphasis added). California courts continue to avoid holding clergymen liable based on religious counseling alone, even when the cleric allegedly had a sexual relationship with a congregant.[5]

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[4] *Marmelstein v. Kehillat New Hempstead*, 892 N.E.2d 375, 376, 379 (N.Y. 2008), (a cleric who is also a licensed professional may be held liable for breach of fiduciary duty "under existing laws and secular standards that govern the practice of those professions"); *Sanders v. Baucum*, 929 F.Supp. 1028, 1034 (N.D. Tex. 1996) ("if a clergyperson holds himself out as having the skill and experience of a secular professional and undertakes to provide a secular service, he can be held to the same secular standard of care by which secular professionals are held under similar circumstances").

[5] *Jacqueline R. v. Household of Faith Family Church, Inc.*, 118 Cal.Rptr.2d 264, 265 (Cal. Ct. App. 2002) (no tort liability for pastor accused of affair with congregant in the course of pastoral counseling because counseling was religious and uncompensated and because "*Nally* precludes [the court] from holding the pastor to

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Other courts have been equally unwilling to entertain breach of fiduciary duty claims against clergy based on sexual relationships that arise in the course of pastoral counseling.[6] Again, the key principle animating these decisions is that religious relationships standing alone do not create secular fiduciary duties. *See Petrell*, 902 N.E.2d at 407 (rejecting a claim of fiduciary duty, in part, because the religious relationship between the claimant and the church authorities "provides no basis to support liability in a civil context").

By contrast, a duty may arise when a person who is a clergyman and also a professional therapist offers his *secular* expertise to a congregant. The person may then be held liable for breaching his fiduciary duty *as a professional* under the same secular standard of care that governs other similarly licensed professionals. Because the relationship is secular and professional, not religious, it is subject to civil court review under secular professional standards. *See, e.g., Sanders v. Casa View Baptist Church*, 134 F.3d 331, 334, 338 (5th Cir. 1998) (First Amendment did not shield a

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the same standard of care applicable to a licensed marriage counselor"); *Richelle v. Roman Catholic Archbishop*, 130 Cal.Rptr.2d 601, 618 (Cal. Ct. App. 2003) (priest accused of a sexual relationship with a congregant held not liable for the breach of fiduciary duty, because her "claim of vulnerability rest[ed] *solely* on her 'deeply religious nature'" and determining how far she was "vulnerable to [the priest] and unable to protect herself effectively" presented "profoundly religious questions, as to which the courts may not constitutionally inquire").

[6] *See Marmelstein*, 892 N.E.2d at 376 & 379 (denying that a rabbi owed a fiduciary duty to a female synagogue member whom he had allegedly tricked into entering a sexual relationship during their religious counseling sessions, because "[a]llegations that give rise to only a general clergy-congregant relationship that includes aspects of counseling do not generally impose a fiduciary obligation upon a cleric"); *Doe v. Roman Catholic Diocese of Rochester*, 907 N.E.2d 683, 684 (N.Y. 2009) (following *Marmelstein* in reversing a lower court decision because the congregant made only bare allegations that the priest occupied a position of control or dominance and that she was uniquely vulnerable). In contrast, at least one court has staked out the highly debatable position that a fiduciary duty exists solely because the defendant was the plaintiff's priest. *Erickson v. Christenson*, 781 P.2d 383, 386 (Or. Ct. App. 1989) ("plaintiff's claim for outrageous conduct is not premised on the mere fact that Christenson is a pastor, but on the fact that, because he was *plaintiff's* pastor and counselor, a special relationship of trust and confidence developed").

minister from liability for damages arising from sexual affairs with two church employees when he had "represented that he was qualified by education and experience to provide marriage counseling").

Nevertheless, in exercising their vital gatekeeper function courts must take great care not to impose a fiduciary duty just because a person is both a clergyman and has professional training as a counselor. The issue is whether the person was acting as a professional counselor or as a clergyman. If the former, a fiduciary relationship might arise. *See Vione*, 820 N.Y.S.2d at 686 (finding a fiduciary relationship because the minister held himself out as a marriage counselor and did not merely "engage[ ] in a consensual sexual relationship while acting as a spiritual adviser."). But if any substantial portion of the relationship was religious, no liability should attach even if secular professional standards were violated. *See Westbrook v. Penley*, 231 S.W.3d 389, 391 (Tex. 2007) (pastor licensed as a professional marriage counselor held not liable for disclosing a congregant's extramarital affair to the church as required by religious doctrine, because "parsing those roles for purposes of determining civil liability in this case, where health or safety are not at issue, would unconstitutionally entangle the court in matters of church governance and impinge on the core religious function of church discipline").

D. Serious Cases of Sexual Misconduct by Clergy are Better Remedied Through Claims for Intentional Infliction of Emotional Distress

Victims of sexual misconduct by clergy are not without a remedy. Violent misconduct, of course, gives rise to civil claims like assault and battery and to criminal charges, like those of which Cantor Segelstein was convicted for his attack on Ramani. *See* Br. App. 2. In nonviolent cases involving sexual misconduct by a clergyman, the right answer is not to shoehorn the clergy/congregant relationship into the constitutionally infirm and doctrinally inapposite category of fiduciary duty, but instead to recognize a claim for intentional infliction of emotional distress.

In Nevada, "the elements of this cause of action are (1) extreme and outrageous conduct with either the intention of, or reckless disregard for, causing emotional distress, (2) the plaintiff's having suffered severe or extreme emotional distress and (3) actual or proximate causation." *Star v. Rabello*, 97 Nev. 124, 125, 625 P.2d 90, 91-92 (1981) (citations omitted). This Court has already held that "improper sexual conduct" can be "extreme and outrageous." *Id.* at 92. Ordinary sexual relationships between adults presumably would not be sufficiently outrageous to impose liability, whereas truly exploitative or oppressive actions by a clergy member against a congregant would. *See Marmelstein*, 892 N.E.2d at 379 & n.4.

This approach avoids serious constitutional problems associated with imposing secular fiduciary duties on clergy (a court would have no need to inquire into religious doctrine or establish religious duties, for example), while still providing relief in egregious cases of clergy misconduct.[7]

III.

CHURCHES AND RELIGIOUS ORGANIZATIONS ARE NOT LIABLE FOR SEXUAL OR INTENTIONAL TORTS COMMITTED BY AGENTS AND VOLUNTEERS

The third issue asks whether this Court should "recognize that a church can be held vicariously liable for a clergy member's improper sexual conduct with a congregant." Order at 3. The answer is no: as a matter law, such conduct is outside the scope of employment and therefore beyond recovery under the theory of vicarious liability.

By statute, employers are not vicariously liable for the misconduct of their employees "if the conduct of the employee . . . (a) [w]as a truly independent venture of the employee; (b) [w]as not committed in the course of the very task assigned to the

[7]Of course, as explained next, a clergyman acts far outside the scope of his agency if he engages in the sort of extreme and outrageous conduct necessary for a claim of intentional infliction of emotional distress.

employee; and (c) [w]as not reasonably foreseeable under the facts and circumstances of the case considering the nature and scope of his employment." NRS 41.745.

Nevada's leading case on vicarious liability is *Wood v. Safeway*, 121 Nev. 724, 121 P.3d 1026 (2005). There a mentally disabled woman brought claims against a janitorial company and its employee for sexual assaults that allegedly occurred at a grocery store where she was employed and he worked as a night janitor. *Id.* at 1028-29. The Court denied vicarious liability, holding that the janitor "was not acting on behalf of Action Cleaning when he assaulted Doe, or out of any sense of duty owed to Action Cleaning." *Id.* at 1037. The Court found that "[t]he sexual assault was also not committed in the course of the tasks assigned to [Ronquillo-Nino] as a janitor." *Id.* at 1039. And it held that his assaults were not reasonably foreseeable because he had no criminal record and the company had received no complaints of sexual harassment regarding him or any other employee during the previous decade. *Id.*

Whether a church should be held vicariously liable for the sexual misconduct of its clergy presents an issue of first impression in Nevada, but neither the statutory standard under NRS 41.745 nor its explication in *Wood* remotely supports doing so. And cases from across the country overwhelmingly hold that as a matter of law sexual torts committed by clergy are not within the scope of their employment.[8] This Court should so hold.

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[8] *See, e.g., Tichenor v. Roman Catholic Church of the Archdiocese of New Orleans*, 32 F.3d 953, 960 (5th Cir. 1994) ("It would be hard to imagine a more difficult argument than that [the priest's] illicit sexual pursuits were somehow related to his duties as a priest or that they in any way furthered the interests of St. Rita's, his employer ... given [his] vow of celibacy and the Catholic Church's unbending stand condemning homosexual relations ...."); *Byrd v. Faber*, 565 N.E.2d 584, 588 (Ohio 1991) ("The Seventh-day Adventist organization in no way promotes or advocates nonconsensual sexual conduct between pastors and parishioners [and] did not hire [the pastor] to rape, seduce, or otherwise physically assault members of his congregation."); *Rita M. v. Roman Catholic Archbishop*, 232 Cal.Rptr. 685, 690 (Cal. Ct. App. 1987) ("It would defy every notion of logic and fairness to say that sexual activity between a priest and a parishioner is characteristic of the Archbishop of the Roman Catholic

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As stated, the LDS Church roundly condemns sexual exploitation by clergy in any form. Any illicit sexual relationship between a clergyman and congregant is "a truly independent venture of the employee." NRS 41.745(a). Indeed, such a relationship is condemned as sinful and contrary to God's will by virtually all religions, and a clergy member who exploits his office to victimize a congregant does not act for the religious organization or out of a duty toward it. *See Wood*, 121 Nev. at 739, 121 P.3d at 1039. Such acts are never "in the course of the very task assigned to the employee." NRS 41.745(b).

The sexual misconduct of unpaid church volunteers likewise falls outside the scope of any agency relationship. California courts hold in the context of claims against churches the rules governing vicarious liability apply "the same for both unpaid volunteers and paid employees," though of course the scope of an unpaid volunteer's agency is often extremely narrow.[9] *Jeffrey Scott E. v. Central Baptist Church*, 243 Cal. Rptr. 128, 130 n.6 (Cal. App. 1988). As with paid clergy, sexual misconduct lies far outside the scope of a church volunteer's agency. Indeed, intentionally tortious conduct in general should rarely if ever be deemed within the scope of a volunteer's agency for a church. *See id.* at 130 (sexual abuse by Sunday school teacher); *Juarez v. Boy Scouts of Am., Inc.*, 97 Cal. Rptr.2d 12, (Cal. Ct. App. 2000) (sexual abuse by scoutmaster).

Church."); *Doe v. Newbury Bible Church*, 933 A.2d 196, 199 n.* (Vt. 2007) (citations omitted); *N.H. v. Presbyterian Church (U.S.A.)*, 998 P.2d 592, 599 n.30 (Okl. 1999) (collecting cases). Oregon courts have taken an extreme minority position on this issue, holding that sexual abuse can sometimes fall within the scope of a clergy member's employment. *See JC2 v. Grammond*, 232 F.Supp.2d 1166, 1170 (D. Or. 2002).

[9] *Compare Scottsdale Jaycees v. Superior Ct.*, 499 P.2d 185, 189 (Ariz. Ct. App. 1972) (a charitable organization held not liable for injuries from a car accident caused by its volunteer who was on his way to an organization meeting, because the drive was outside the scope of his employment) *with Baxter v. Morningside, Inc.*, 521 P.2d 946, 949 (Wash. Ct. App. 1974) (a charitable organization held liable for injuries from a car accident caused by its volunteer whose agreement with the organization

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This Court also should be cautious about allowing churches to be held vicariously liable for their volunteers in cases of ordinary negligence. Religious organizations have historically provided invaluable volunteer services to their communities in myriad ways, from soup kitchens and disaster relief to direct financial assistance to the poor. Yet their resources are limited. They will be far less likely to provide such services if they risk being held liable for every tort of their volunteers. This concern is acute for the LDS Church, whose religious doctrine and ecclesiastical practice dictate that nearly every adult member shoulder volunteer religious responsibilities and engage in ministry of some sort. Such organizations would face intolerable burdens if the law left any doubt that vicarious liability is limited to non-intentional torts committed within the precise scope of any alleged volunteer agency.

In all events, this Court should not hold religious organizations vicariously liable for the sexual misconduct of clergy or unpaid volunteers.

IV.

THE FIRST AMENDMENT BARS OR LIMITS CLAIMS AGAINST A CHURCH FOR NEGLIGENT HIRING, RETENTION, OR SUPERVISION OF A CLERGY MEMBER OR UNPAID VOLUNTEER

Lastly, the Court directed briefing on whether, "under Nevada law . . . a claim for negligent hiring, supervision, or retention of a clergy member or an unpaid volunteer, who engages in tortious conduct, exist[s] against a church?" Order at 3. To the extent this Court intended to limit the inquiry to Nevada law, the short answer is that no such claims have been recognized against churches in the decisions of this Court. Notably, Ramani's brief fails to cite a single supporting example from Nevada case law. More broadly, the First Amendment would bar or severely limit such claims in most circumstances because they excessively entangle the courts with ecclesiastical issues.

"controll[ed] the time, destination and purpose of the trip").

A. The First Amendment Bars a Claim Against a Church for the Negligent Hiring or Retention of a Clergy Member or Volunteer Who Performs Spiritual Functions Within a Church

In Nevada, "[t]he tort of negligent hiring imposes a general duty on the employer to conduct a reasonable background check on a potential employee to ensure that the employee is fit for the position." *Burnett v. C.B.A. Security Service, Inc.*, 107 Nev. 787, 789, 820 P.2d 750, 751 (1991) (per curiam). This Court has explained that "[a]n employer breaches this duty when it hires an employee even though the employer knew, or should have known, of that employee's dangerous propensities." *Hall v. SSF, Inc.*, 112 Nev. 1384, 1392, 930 P.2d 94, 98, 99 (1996). Whether the employer conducted a reasonable background check is the central inquiry in negligent hiring cases. In *Burnett*, this Court held that a security firm was not liable for the negligent hiring of a security guard who stole an apartment tenant's car and got into an accident, because neither of two separate background investigations "revealed any indication that [the guard] would use his position to misappropriate a motor vehicle". 820 P.2d at 751.

Similarly, a cause of action for negligent retention turns on the employer's "duty to use reasonable care ... to make sure that the employees are fit for their positions." *Hall*, 930 P.2d at 99 (citing 27 Am.Jur.2d *Employment Relationship* §§ 475-76 (1996)). No reported case in Nevada has applied these standards to claims against churches for the alleged misconduct of their clergy or unpaid volunteers. Imposing on churches the secular requirement of a reasonable background check when selecting clergy or volunteers or the related duty of "mak[ing] sure that [clergy] are fit for their positions" (*id.*) would contravene the First Amendment.[10]

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[10]A few courts have ruled to the contrary, finding the First Amendment inapplicable when upholding claims of negligent hiring and supervision. *See Malicki v. Doe*, 815 So.2d 347, 364 (Fla. 2002) (footnote omitted); *Moses v. Diocese*, 863 P.2d 310, 323 n.15 (Colo. 1993). Such decisions ignore the majority understanding, set forth below, that civil courts cannot constitutionally regulate the selection of clergy.

As established, the First Amendment's guarantee of autonomy for religious organizations—"an independence from secular control or manipulation," *Kedroff*, 344 U.S. at 116—leaves churches free "to determine what the essential qualifications of [clergy] are and whether the candidate possesses them." *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 19 (1929). Indeed, "[t]he relationship between an organized church and its ministers" — how they are selected, trained, supervised, and released — is the "lifeblood" of a church and thus a matter of "prime ecclesiastical concern." *McClure*, 460 F.2d at 558-59. Legislation or judicial decisions that regulate "the appointment of clergy" unambiguously infringe on a church's religious liberty. *Kedroff*, 344 U.S. at 107. In short, the right of a religious organization to select its own clergy "must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference." *Id.* at 116; *see Ayon v. Gourley*, 47 F.Supp.2d 1246, 1250 (D. Colo. 1998), *aff'd* 185 F.3d 873 (10th Cir. 1999) ("The choice of individuals to serve as ministers is one of the most fundamental rights belonging to a religious institution."); *Isely v. Capuchin Province*, 880 F.Supp. 1138, 1150 (E.D. Mich. 1995) ("[A]ny inquiry into the decision of who should be permitted to become or remain a priest necessarily would involve prohibited excessive entanglement with religion.").

This constitutional liberty to select clergy free from secular control is the animating principle behind the ministerial exception cases. Courts have widely held that a religious organization's decisions about clergy selection and retention—choices of "who would perform spiritual functions and about how those functions would be divided"—are exempt from legal challenge under federal civil rights laws and common law tort actions. *Petruska v. Gannon University*, 462 F.3d 294, 307-08 (3d Cir. 2006), cert. denied, 550 U.S. 903 (2007) (dismissing a female chaplain's Title VII claims for gender discrimination and retaliation for opposing sexual harassment

against a private Catholic university because the decision to restructure university leadership and demote her fell within the ministerial exception).[11]

Holding a religious organization liable for negligently hiring or retaining the cleric of its choice is unconstitutional, no matter how unreasonable that decision appears to a civil court or jury. A civil court has no standards to second-guess whom a church selects to be the "lifeblood" of its faith community. Who is appointed to preach the Word or mediate between God and the faithful are inescapably religious questions. As the Wisconsin Supreme Court has held, "the First Amendment to the United States Constitution prevents the courts of this state from determining what makes one competent to serve as a Catholic priest since such a determination would require interpretation of church canons and internal church policies and practices." *Pritzlaff v. Archdiocese of Milwaukee*, 533 N.W.2d 780, 790 (Wis. 1995).

Additionally, adjudicating negligent hiring and retention claims against churches for the employment of clergy is impermissible because a civil court cannot inquire into "matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law." *Serbian E. Orthodox Diocese*, 426 U.S. at 713; *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979) (the "very process of inquiry" can "impinge upon rights guaranteed by the Religion Clauses"). And yet a negligence standard "must make proper allowance for ... the circumstances under which [the defendant] must act." W. Page Keeton *et al*, *Prosser and Keeton on The Law of Torts* § 32, p. 174 (1984). A church's polity and doctrinal beliefs are among the unique factual "circumstances" that—as a matter of tort law—would ordinarily be essential to

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[11] *See Gunn v. Mariners Church, Inc.*, 167 Cal. App. 4th 206, 217 (Cal. Ct. App. 2008) (holding that the ministerial exception applied to a church leader's announcement in a church meeting that a former worship director had been dismissed for homosexuality); *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648, 656 (10th Cir. 2002) (the ministerial exception to Title VII employment discrimination cases arises from the constitutional principle of church autonomy: "The right to choose ministers is an important part of internal church governance and can be essential to the well-

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consider when deciding whether a church (considered as an entire congregation or as a single leader or officer) acted reasonably in hiring and retaining a given member of the clergy.

But such an inquiry inevitably leads the court into constitutionally prohibited inquiries concerning religious belief and church government, which explains why even adjudicating a claim against a church for the negligent hiring or retention clergy is unconstitutional. *See Gibson v. Brewer*, 952 S.W.2d 239, 246-47 (Mo. 1997) (holding that adjudication of claims for negligent hiring, training, supervision, and retention of clergy "necessarily involve interpretation of religious doctrine, policy, and administration," which creates "excessive entanglement between church and state [and] has the effect of inhibiting religion, in violation of the First Amendment").

The same bar on adjudication holds for employees holding unordained offices and unpaid volunteers who perform spiritually significant functions within a church.[12] Hence, an action for negligent hiring or retention should not lie against a church based on the actions of a volunteer responsible for selecting worship music or teaching Bible study. By contrast, such a claim might well lie against a church where an employee or volunteer is engaged solely to perform secular functions, such as mowing the chapel lawn.

One might argue that the need to delve into religious doctrine would be reduced if a court dictated a single secular standard governing church hiring and retention

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being of a church").

[12] *See Petruska*, 462 F.3d at 307-08 (the ministerial exception applies to the selection and retention of those who perform "spiritual functions"); *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 805 (4th Cir. 2000) ("the functions of the music ministry and music teaching positions in this case are integral to the spiritual and pastoral mission of Sacred Heart Cathedral"); *Catholic Univ. of Am.*, 83 F.3d at 465 ("employment as a tenured member of the Department of Canon Law so clearly meets the ministerial function test"); ("*Rayburn v. General Conference of Seventh Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985) (the unordained office of associate in pastoral care "so embodies the basic purpose of the religious institution that state scrutiny of the process for filling the position would raise constitutional problems").

decisions. But as with defining the fiduciary duties of clerics, dictating church employment standards would only deepen the unconstitutionality because the government has no power "to prescribe what shall be orthodox in ... religion." *Barnette*, 319 U.S. at 642. A government standard likely would favor bureaucratic approaches to clergy oversight, thereby privileging hierarchical (or at least highly organized) church polities over congregational or less structured ones. This "would result in an endorsement of religion, by approving one model for church hiring, ordination, and retention of clergy" over others – a plainly unconstitutional result. *Gibson*, 952 S.W.2d at 247.

In sum, the Court should reject any claim seeking to hold a church liable for the negligent hiring or retention of its clergy or spiritual volunteers.

B. The First Amendment Bars a Claim Against a Church for the Negligent Supervision of a Clergy Member or Unpaid Volunteer, but May Permit a Claim for Intentional Failure to Supervise If the Church Disregards a Known Risk of Harm

Because it is based on notions of secular duty, a standard claim of negligent supervision of clergy or spiritually significant volunteers unconstitutionally intrudes on ecclesiastical matters no less than any other negligence-based claim. Courts have held that "'[t]he imposition of secular duties and liability on the church [for negligent supervision of clergy] ... will infringe upon its right to determine the standards governing the relationship between the church, its bishop, and the parish priest. . . . Because of the existence of these constitutionally protected beliefs governing ecclesiastical relationships, clergy members cannot be treated in law as though they were common law employees." *Swanson v. Roman Catholic Bishop of Portland*, 692 A.2d 441, 445 (Me. 1997).

Nevertheless, in some circumstances a narrowly crafted claim against a church for failing to supervise its clergy can be appropriate. The Missouri Supreme Court's reasoning in *Gibson*, 952 S.W.2d at 239, provides a constitutionally sensitive approach by distinguishing between negligent supervision and intentional failure to

supervise. Presented there were claims, among others, against a Catholic diocese for negligently supervising a priest accused of abuse. *See id.* at 243, 247. The court discerned that "[a]djudicating the reasonableness of a church's supervision of a cleric—what the church 'should know'—requires inquiry into religious doctrine." *Id.* Concluding that such an inquiry "would create an excessive entanglement, inhibit religion, and result in the endorsement of one model of supervision," the court declined to apply a claim of *negligent* supervision against the diocese for the priest's alleged misconduct. *Id.* at 247.[13]

The court distinguished a claim of *negligent* supervision from a church's *intentional* failure to supervise a clergyman, noting that the latter "does not offend the First Amendment." *Id.* at 248. Such a claim exists if "(1) a supervisor (or supervisors) exists (2) the supervisor (or supervisors) knew that harm was certain or substantially certain to result, (3) the supervisor (or supervisors) disregarded this known risk, (4) the supervisor's inaction caused damage, and (5) the other requirements of the RESTATEMENT (SECOND) OF TORTS § 317 are met." *Id.*

Most critically, section 317 of the Restatement requires the plaintiff to prove that the master "knows or has reason to know that he has the ability to control his servant, and *knows or should know of the necessity and opportunity for exercising such control.*" RESTATEMENT (SECOND) OF TORTS § 317 (emphasis added).[14] This is

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[13]Imposing a standard of care that holds a church liable if it "should have known" about the tortious propensities of mere volunteers would subject religious organizations like the LDS Church to virtually unlimited liability. As described above, it relies on the volunteer services of nearly every willing adult member to carry out its ministerial and charitable missions. Other religious organizations rely on member volunteers in similar ways. Imputing to such groups constructive notice of the background and character of virtually every adult member, and then holding them liable for allegedly failing to adequately monitor such members, would impose a crushing and unconstitutional burden on the exercise of religion.

[14]In setting forth these elements, the *Gibson* Court explained that this cause of action requires proof that a church had a supervisor responsible for the person accused of tortious conduct, but that the First Amendment does not permit a court to inquire

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an actual knowledge standard. Because the victim and his parents in *Gibson* "alleged that the Diocese knew that harm was certain or substantially certain to result from its failure to supervise [the priest]," the court reversed the trial court's dismissal of their claim. *Id.*

Gibson's distinction between impermissible claims of negligent supervision on the one hand and, on the other, claims for intentional failure to supervise in the face of actual knowledge of danger strikes a proper balance. It permits relief in egregious failure-to-supervise cases while avoiding constitutionally forbidden inquiries into religious belief, church government, and what ecclesiastical leaders "should have known" in the conduct of their religious duties. This Court should adopt the *Gibson* standard for claims against churches alleging failure to supervise.

CONCLUSION

For the foregoing reasons, we urge this Court to answer the questions in its Order as set forth above and, accordingly, to reject Ramani's claims, and to affirm the district court's grant of summary judgment.

DATED this 5th day of October, 2009.

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"whether or not a cleric *should* have a supervisor." 952 S.W.2d at 239 (emphasis added).

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 5th day of October, 2009.

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CERTIFICATE OF SERVICE

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